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February 14, 1995

Via Federal Express

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Comments of Palmer Communications Incorporated supporting
Cellular Telephone Industry Association's Petition for Rule Making
RM-8577

Dear Mr. Caton:

Transmitted herewith, on behalf of Palmer Communications Incorporated, is one original and 9 copies of its Comments filed in support of the above-referenced Cellular Telecommunications Industry Association's Petition for Rule Making, filed December 22, 1994. Please date-stamp the enclosed file copy and return it to the undersigned in the enclosed postage pre-paid envelope. Do not hesitate to call me if you have any questions regarding this filing.

Sincerely,

Marianne H. LePera
Staff Attorney

Enclosures

cc: R. Engelhardt
P. Meehan
J. Fredrickson

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**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Amendment of the Commission's Rules) RM-8577
To Preempt State and Local Regulation)
of Tower Siting For Commercial)
Mobile Services Providers)

To: The Commission

FILED
FEB 1 1995

COMMENTS

DOCKET FILE COPY ORIGINAL

Palmer Communications Incorporated ("Palmer"), on behalf of its wireless companies¹, hereby submits *Comments* in support of the above-captioned *Cellular Telephone Industry Association's Petition for Rule Making (Petition)*. In its *Petition*, the Cellular Telephone Industry Association ("CTIA") requests that the Commission undertake a rule making proceeding to assert its authority for the preemption of state and local regulations which have the effect of precluding or impeding the construction of new communications towers by commercial mobile radio service ("CMRS") providers. Palmer fully supports the *Petition* filed by CTIA.

I. Regulatory Framework for Preemption. In its *Petition*, CTIA sets forth a sound regulatory framework within which the Commission may assert its preemption authority over state and local zoning and other regulations which impair the ability of CMRS providers to construct communications towers. Preemption by the Commission would further the federal policy of deploying CMRS rapidly and efficiently across the nation.

¹ Palmer is the parent company or managing partner of multiple cellular, microwave, SMR and paging licensees.

A. Section 332 Limitation on State Authority.

(i) Preempt regulations which thwart federal policy. In its *Petition*, CTIA demonstrates the limiting effect local zoning regulations have upon the ability of existing CMRS providers to expeditiously expand wireless telecommunications infrastructure. Palmer agrees with CTIA's characterization that, although zoning regulations are generally considered local in nature and would otherwise be considered within the States' reservation of authority, in the case of communications tower siting, the zoning regulations have a direct and identifiable negative impact on the development of a nationwide seamless, wireless network. Thus, the local regulation thwarts the Congressional mandate of rapid and ubiquitous deployment of wireless services.

In Palmer's experience, in cities with more elaborate zoning and permitting regulations, the cost of constructing a new communications tower can be considerably more expensive and can take twice as long to obtain permits for construction. Local zoning regulations of a cellular market can shift the focus from placing towers in the areas which will best serve the public at the most efficient prices, to constantly seeking creative alternatives, such as rooftop leases or purchases of existing communications towers (even though possibly at a greater expense due to the need for repairs or modifications) which will not invoke the full wrath of the local zoning commission. In one Palmer market, communications towers are not permitted uses in commercial areas, but only areas zoned as industrial or light industrial. Since the best service is obtained by placing towers where the people using cellular phones are located, for many towers, Palmer has incurred delays of approximately one year in obtaining variances. Perhaps Palmer's most dramatic example is that of its efforts to locate a cell on a local resort island. Zoning approval was obtained only after three years of negotiating with the local council, and only after a council

member suggested that he had “consulted” with the animal inhabitants of a wildlife sanctuary. In addition to the delay incurred by obtaining zoning approval and variances, Palmer has also sustained additional expenses resulting from unreasonable or unrealistic tower design specifications imposed by local authorities. In one case, Palmer was required to design a tower with wind load specifications which far exceeded the industry standard wind load criteria for that locale. In short, Palmer believes that without preemption of local tower siting regulations, CMRS providers will continue to experience delays and additional, unnecessary expenses in the construction of their systems.

In a *Notice of Proposed Rule Making* (“NPRM”) recently adopted by the Commission,² a proceeding was established to, *inter alia*, seek comment on the Commission’s plan to preempt inconsistent state regulation of the provision of 911 service, which affects interstate service or which “thwarts or impedes a federal policy.” *NPRM* at ¶ 59. Palmer suggests that a similar evaluation is warranted with respect to local tower siting regulations.

(ii) Local regulation of “entry” into CMRS is proscribed. Section 332 of the Communications Act of 1934, as amended (the “Act”), expressly prohibits state regulation of “entry” into mobile services. Although not directly addressed in CTIA’s *Petition*, but of significant importance under Section 332, is the indirect effect the local zoning ordinances have on actual “entry” of licensees in the cellular market. Under Section 22.947 of the Commission’s Rules, land licensed by the FCC which is not served at the end of the “five year build-out period” is forfeited by the licensee and subject to licensing under the Commission’s unserved area licensing procedures.³ The ability of local authorities to impede or simply delay the construction

² Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Notice of Proposed Rule Making*, CC Docket No. 94-102, RM-8143, FCC 94-237 (rel. Oct. 19, 1994).

³ See Section 22.949 of the Commission’s Rules.

of communications towers vests in those local authorities an indirect impact on “entry” into the cellular arena. The complicated web of local zoning regulations can quite literally dispossess an FCC-chosen cellular licensee from its FCC authority to serve a portion of its cellular market, by making it impossible for the licensee to construct the facilities essential for the provision of service within the five year build-out period. In this regard, local regulations which serve to block or delay the construction of infrastructure have an indirect, but tangible impact on “entry” into CMRS. Taken to the next logical conclusion, local regulators who have the ability to determine whether to issue zoning clearance, and to whom to issue such clearance, can ultimately dictate which service provider serves their local market, or portions thereof.⁴ This is “entry” regulation at its heart, however indirect. Section 332 of the Act proscribes entry regulation by states and localities, thus preemption of tower siting issues by the FCC would place the determination of these entry issues back with the Commission exclusively.

B. Preemption is Supported By Section 2(b) of the Act.

In its *Petition*, CTIA demonstrates that, although Section 2(b) of the Act generally directs FCC jurisdiction to matters interstate in nature and states retain jurisdiction over matter which are intrastate in nature, preemption is appropriate in the case of state and local tower siting regulation to “prevent the negation of legitimate national policy objectives.” *Petition* at 11. Palmer supports CTIA’s analysis regarding preemption under Section 2(b). Palmer agrees that the issue of tower siting cannot be classified as purely intrastate in nature, because it impedes the expeditious construction of a nationwide seamless wireless network and the ability of wireless users in all areas of the country to connect to the Public Switched Telephone Network (“PSTN”) and thus

⁴ Subject, of course, to prior FCC authorization of the provider.

interstate telephone services. To argue that tower siting is purely a intrastate issue and would be to ignore the impact the lack of such tower sites have on the nationwide wireless network.

II. Tower Site Preemption is Supported by FCC Precedent.

In its *Petition*, CTIA analogizes the preemption of CMRS tower sites to the Commission's preemption of unreasonable and discriminatory state/local zoning regulations regarding satellite earth receiving stations and amateur radio antennas. *Petition* at 14-16. In both examples cited by CTIA, the policy reasons supporting Commission preemption are dwarfed by those supporting tower siting preemption for CMRS. In the case of satellite earth receiving stations, the policy at hand was one of protecting the rights of individuals to receive satellite signals, and to avoid the favorable treatment of one communications service over another. *Petition* at 15. In the case of amateur radio antennas, the policy protected is even more compelling, considering the role amateur radio has played in providing communications during disasters. However, the scope and importance of the services which CMRS will provide far outweigh those of the two example cited, if not simply because of the sheer penetration of wireless communications throughout our population. Commission precedent clearly demonstrates the vital need to preempt state and local regulations which impede the construction of communications towers.

III. Conclusion.

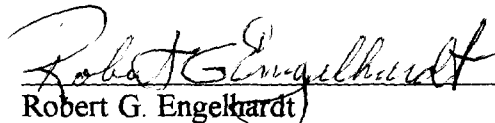
Palmer emphatically supports CTIA's *Petition for Rule Making*. Palmer encourages the Commissions to undertake a rule making to further explore and solicit comment on the need commonly perceived among CMRS providers for relief from state and local tower siting regulation which thwarts the federal policy to provide nationwide wireless service and acts as an indirect and impermissible regulation of "entry" to CMRS. Palmer agrees with CTIA that the

issue of tower siting cannot be exclusively classified as intrastate in nature, thus Section 2(b) preemption is appropriate. Finally, the policy considerations which drive the industry's request for preemption of tower siting regulations far exceed in importance and scope the policies which supported the Commission's preemption of state/local regulation of antennas for other communications services. Accordingly, we respectfully ask the Commission to grant the above-captioned *Petition* of CTIA.

Respectfully submitted,

PALMER COMMUNICATIONS
INCORPORATED

By:



Robert G. Engelhardt
Executive Vice President and Secretary
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February 14, 1995

CERTIFICATE OF SERVICE

I, Lucy DiMare, a secretary with Palmer Communications Incorporated, do hereby certify that a true and correct copy of the foregoing COMMENTS were served, via First Class United States mail, postage prepaid, on this 14th day of February, 1995, upon the following parties:

Chairman Reed E. Hunt
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20554

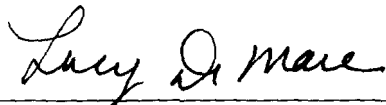
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